Supreme Court, U.S.
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No. 95-1750

In The

# Supreme Court of the United States

October Term, 1995

CHRISTOPHER NOLEN,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

(1) Whether, in light of the construction of the state statute in question by the courts of the State of Georgia as having the protection of the public as its paramount purpose, and that any deterrent effect is merely incidental to that paramount legislative purpose, Petitioner's claim presents a substantial federal question for review?

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## OPINIONS BELOW

Opinions were issued in this case by the State Court of Gwinnett County, the Georgia Court of Appeals, and the Supreme Court of Georgia. The opinion of the Georgia Court of Appeals is reported at 218 Ga. App. 819, 463 S.E.2d 504 (1995). The Orders of the State Court of Gwinnett County, and of the Georgia Supreme Court, are unreported. Each opinion is attached to Petitioner's Petition for Writ of Certiorari as appendices.

## JURISDICTION

Petitioner apparently premises the jurisdiction of this Court upon Rule 10(c) of the Rules of the Supreme Court of the United States. However, this rule is not a basis for jurisidiction at all, but rather an advisement by the Court of a general class of cases in which a request for certiorari may be granted. Rather, jurisdiction is conferred by 28 U.S.C. § 1257(a).

Respondent submits that the ultimate issue in this action, as presented by the petition, is Petitioner's contention that the construction and interpretation of O.C.G.A. § 40-5-67.1 by the Georgia Court of Appeals is erroneous. Because this Court lacks jurisdiction to review the construction of state statutes by the courts of the state, this Court lacks jurisdiction to consider the issues presented by the petition.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOKED

Petitioner has cited the relevant constitutional and statutory provisions in the petition.

## STATEMENT OF THE CASE

The instant action is one of two companion cases resolved by the Georgia Court of Appeals in double jeopardy challenges to Georgia's Administrative License Suspension Act. Georgia's act applies to two categories of drivers: those who refuse to submit to the state-administered chemical test(s) designated by a law enforcement officer and those who take the test, but whose results are above a designated level (which varies depending upon the age of the driver and the type of vehicle driven). The requirement of testing also applies to two categories of drivers: those arrested and charged with driving under the influence and those involved in a serious traffic accident.

In the case at bar, the record reflects that Petitioner was arrested on May 28, 1994, and charged with driving under the influence. He was issued a DPS Form 1205 (a notice of the intent to suspend his driver's license) by the arresting officer. Neither the petition nor the appendices thereto indicate the reason for the issuance of the form (i.e., whether Petitioner refused to submit to the designated test or because the results were above the applicable amount). The petition and the appendices thereto also do not indicate whether or not the arrest of Petitioner

followed the investigation of a serious traffic accident, or whether he was arrested following a traffic stop or at a driver's license checkpoint. The record reflects that, following an administrative hearing, the suspension was withdrawn. The record does not, however, reflect the reason for the withdrawal of the suspension.

Following the conclusion of the administrative proceeding, Petitioner filed a Motion for Discharge and Acquittal, contending that the license suspension hearing constituted a prosecution which had been concluded and that further prosecution of the criminal charges in the State Court of Gwinnett County constituted double jeopardy. The State Court denied the motion. Under Georgia law, a plea of double jeopardy is subject to interlocutory appeal unless the State contends, and the Court finds, that the appeal is frivolous and is interposed for the purpose of delay. No such contention was made in this case, and Petitioner took an appeal to the Georgia Court of Appeals.

That Court heard the case *en banc* (or, in the Georgia parlance, as a "whole court") and issued an opinion on October 2, 1995, affirming the judgment of the State Court. Construing the statute, the Court found that its "paramount purpose" was to protect the public from dangerous drivers, and that any deterrent effect was merely "incidental." The Court found no punitive purpose whatsoever. The Court denied reconsideration on October 26, 1995, and the Supreme Court of Georgia unanimously denied certiorari on January 26, 1996. The Petition for Writ of Certiorari was served on April 25, 1996, and apparently filed with this Court that same day.

## REASONS WHY THE WRIT SHOULD BE DENIED

### A. THIS COURT CANNOT REVIEW THE CONSTRUCTION OF A STATE STATUTE BY THE COURTS OF THAT STATE.

While a cursory review of the petition might leave the impression that Petitioner presents a challenge to a state statute under the double jeopardy clause (U.S. Const. Amend. V), a closer review reveals that such is not the case. Petitioner in fact challenges the correctness of the construction of that statute by the Georgia Court of Appeals; specifically, that court's finding that the statute in question has as its purpose the "protect[ion of] public safety, and the deterrent effect is only incidental. . . . " *Nolen v. State*, 218 Ga. App. 819, 823, 463 S.E.2d 504 (1995).

This Court has repeatedly held that, under basic principles of federalism inherent in the United States Constitution, it cannot review the construction of state statutes by courts of the state. *See, e.g., O'Connell v. Kirchner*, ___ U.S. ___, 115 S.Ct. 891, 130 L.Ed.2d 873 (1995), in which Justice Stevens noted that, despite the petitioners' claims that state law entitled them to more process than had been afforded, the federal courts were bound by the state supreme court's determination that no such process was mandated by state law.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Court held that:

> Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is not one that we would have

> reached if we were construing the statute in the first instance.

*R.A.V.*, 505 U.S. at 412. In the case at bar, the Georgia Court of Appeals has construed the legislative purpose as the single purpose of protection of the public, and that any deterrent effect is simply providential and unintended. Under this Court's precedents, such a holding mandates the conclusion that the statute does not offend double jeopardy.

### B. A REMEDIAL STATUTE, SUCH AS O.C.G.A. § 40-5-67.1, DOES NOT OFFEND THE DOUBLE JEOPARDY CLAUSE.

In the petition, Petitioner relies upon three recent cases decided by this Court. Those cases are *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). In addition to the fact that the Court found a violation in each instance, the cases have another common thread: none involved a prior construction of a state statute by the courts of the state. Both *Halper* and *Austin* dealt with federal statutes, which this Court is responsible for construing; *Kurth Ranch* arose in the United States Bankruptcy Court, which construed the Montana statute itself. The Montana courts apparently had not previously construed the statute and were not asked to do so in that case. In the case at bar, the Georgia courts have construed the statute in question, finding that its purpose is prophylactic rather than punitive. Thus, the

*Halper/Austin/Kurth Ranch* test, which focuses how to construe a challenged statute, is not applicable in the case at bar, because the statute has already been construed by the state courts in a manner which comports with the constitutional requirements.

Indeed, when *Halper, Austin,* and *Kurth Ranch* are applied to the statute as construed, it is apparent that there has been no violation of the double jeopardy clause. As noted *supra,* the Georgia Court of Appeals found that the purpose of the statute was the protection of the public, and that any deterrent effect was merely incidental. That construction having been given, it is clear that the statute is not subject to challenge on double jeopardy grounds because its purpose is not to deter or punish. *Austin,* 113 S.Ct. at 2812.

### C. O.C.G.A. § 40-5-67.1 IS REMEDIAL EVEN WHEN CONSTRUED IN THE FIRST INSTANCE.

Even if O.C.G.A. § 40-5-67.1 had not previously been construed by the Georgia courts, proper statutory construction compels the conclusion that its purposes are remedial, rather than punitive. Petitioner relies upon three prior decisions of this Court; however, proper application of those opinions to this case mandates the conclusion that the state construction was correct.

In *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the Court dealt with a civil remedy pursued only after a prior criminal conviction. The *Halper* Court contemplated that its application would be limited to the "rare" case in which the intent to punish

was unmistakable. *Id.*, at 449. The Court also limited its holding to punitive civil actions following a criminal prosecution. *Id.*, at 448. Of course, *Halper* dealt with the imposition of money damages, which could be mechanically compared with the actual injury to the Government to aid in the determination of the legislative purpose.

When the Court reviewed a forfeiture provision in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the Court found that the historical understanding of forfeitures as punishment, coupled with evidence of legislative intent as to the specific statute in issue demonstrating "that Congress understood those provisions as serving to deter and to punish," mandated the conclusion that the forfeiture statute was punitive, rather than remedial. *Id.*, at 2812.

Finally, in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the Court reviewed a Montana statute taxing marijuana. The *Kurth Ranch* Court reaffirmed that *Halper* was limited to civil proceedings following a criminal prosecution (the same scenario is present in *Kurth Ranch*, but not in the case at bar). *Id.*, at 1944. The Court also reaffirmed that the perspective of the defendant (that is, whether the statutory consequences "feel" like punishment) is irrelevant to the determination. *Id.*, at 1944 n.14; *see also Halper*, 490 U.S. at 447 n.7. Again, the Court dealt with a monetary imposition (in this case, a tax) which could be mechanically, if roughly, compared to the damage done in determining if the tax was punitive in nature.

By contrast, the Georgia statute is non-monetary. It mandates the suspension of the driver's license, a mere

privilege, as a consequence of either a refusal to submit to testing or submission with results above the statutory minimum, by a driver either arrested and charged with driving under the influence or involved in a serious traffic accident. The Georgia General Assembly has expressly stated that the purpose of its implied consent and administrative license suspension laws is to immediately remove intoxicated, dangerous, and negligent drivers from the highways of the State, because they present a direct and immediate threat to the welfare and safety of the general public. O.C.G.A. § 40-5-57; O.C.G.A. § 40-5-55(a). Thus, the Georgia Court of Appeals did not err in concluding that the driver's license suspension was not punitive in nature, but remedial, and thus did not implicate the double jeopardy clause.

Petitioner's attempt to apply the *Kurth Ranch* test to this case is seriously flawed. Upon closer examination, it can be seen that the test does not mandate the conclusion that the statute is punitive in character; rather, it mandates the contrary conclusion.

The first factor is whether or not the suspension is conditioned upon the commission of a crime. Petitioner states that this is the case here and notes that the Court stated that this condition is a significant indicator of penal intent on the part of the legislature. *Kurth Ranch*, 114 S.Ct. at 1947. However, the Georgia statute is not so limited. While applicable to drivers arrested for driving under the influence, it is equally applicable to all drivers who are involved in a serious traffic accident. O.C.G.A. § 40-5-55(a). A serious traffic accident is one in which an occupant of one of the vehicles involved in the accident is killed or suffers an enumerated physical

injury. O.C.G.A. § 40-5-55(c). Thus, the statute is not limited to those who have committed a crime, and the converse of the Court's statement must apply: the fact that the statute is not exclusively conditioned upon the commission of a crime is a powerful indicator that the legislative intent was *not* punitive.

For the same reasons, again contrary to Petitioner's argument, neither the second nor third *Kurth Ranch* factors support Petitioner's claims: the suspension is not applicable solely to those driving under the influence, and those drivers are not the entire class of persons subject to the suspension.

While the fourth and fifth factors are present, neither mandates a contrary conclusion. Petitioner makes much of the fact that the license suspension is imposed in a separate proceeding; however, that fact demonstrates nothing. Indeed, Respondent submits that, if the suspension were to be imposed in the same proceeding, that fact would point to, if not establish, the punitive character of such a suspension; the fact that there are separate proceedings is equally powerful evidence that the Georgia General Assembly understood the suspension procedure to be remedial and not punitive in character.

Thus, application of the *Kurth Ranch* test also mandates the conclusion that O.C.G.A. § 40-5-67.1 and the other statutes implicated in Georgia's administrative license suspension statute are remedial, not punitive, in nature. Thus, the prosecution of Petitioner on the criminal charge of driving under the influence is not a violation of the double jeopardy clause of Amendment Five.

### D. THIS RECORD IS INSUFFICIENTLY DEVELOPED TO WARRANT REVIEW.

In the case at bar, Petitioner mounts a broad-based challenge to Georgia's administrative license suspension statutory scheme. Under the provisions of these statutes, the Georgia Department of Public Safety is called upon to suspend thousands of driver's licenses each year. Because of the potentially broad sweep of Petitioner's brush, it is essential that this Court have before it all of the facts necessary to full consideration of the issues.

In this case, the petition and appendices do not even reflect why Petitioner's driver's license was initially suspended. Because the analysis necessarily must differ depending upon whether or not the suspension was based upon a refusal to submit to chemical testing or a submission with test results above the minimum established by law, this shortcoming is crucial. Similarly, as noted by the Court of Appeals, the record does not reflect the reason for the withdrawal of the license suspension by the Administrative Law Judge. Thus, this case is not appropriate for review by this Court.

## CONCLUSION

The Petition for Writ of Certiorari presents no substantial federal questions for review. The statute has been construed by the Georgia Courts, which have determined that the statute is remedial, rather than punitive, in purpose. This Court does not sit to review the correctness of a state court's interpretation of its own law. Because the

purpose of the statute is remedial, not punitive, the double jeopardy clause is not offended by the suspension of Petitioner's driver's license and prosecution on criminal charges for driving under the influence in separate proceedings. Even if the statute is construed by this Court, its purpose is clearly remedial and not punitive. For the above and foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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